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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DARWIN HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B205663
(Super. Ct. No. VA101465)
(Los Angeles County)

Darwin Hernandez appeals from a judgment following his conviction, after a jury trial, of three counts of committing a forcible lewd act upon a child under the age of 14 and one count of aggravated sexual assault of a child. (Pen. Code, §§ 288, subd. (b), 269.)¹ The jury also found four great bodily injury enhancement allegations to be true. (§§ 12022.8, 12022.7.) The court sentenced appellant to 53 years to life in state prison. Appellant challenges the sufficiency of the evidence to support three of the five-year great bodily injury enhancements, raises instructional error, and argues that the prosecutor committed misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

V.C. was born in April 1998. During 2005 and 2006, she lived with her mother, A.J., appellant, and her younger half-brother. V.C.'s younger half-

¹ All statutory references are to the Penal Code.

brother is the son of appellant and A.J. Appellant's brother, C.H., and his girlfriend also lived with V.C.'s family.

A.J., V.C.'s mother, worked every night except Monday from approximately 8:00 p.m. to 2:00 a.m. On many of those nights appellant would lie in V.C.'s bed, behind her, and touch and penetrate her vagina. It hurt and tickled V.C. when he did that. If she cried, appellant covered her mouth with his hands. He told V.C. that if she told any adult that he was touching her, he would take her younger half-brother away. V.C. testified that appellant touched her on 20 different occasions. She also testified that he touched her every day for a year, and that he would insert his penis and his fingers into her anus and her vagina.

A.J. ended her relationship with appellant some time in April 2006. Approximately a month later, V.C. showed A.J. a rash on her vagina. On May 9, 2006, A.J. took V.C. to the Los Angeles Children's Hospital emergency department (Children's Hospital), where Dr. Ilene Claudius examined her. Claudius observed genital warts on V.C.'s clitoris, inside her labia minora, and under her hymen. The genital warts under her hymen were "violaceous and darkly colored as if they had been traumatized in some way" after their formation. Claudius examined several other areas of V.C.'s body, including her anus, but found no other warts. Genital warts are caused by the human papilloma virus (HPV), a sexually transmitted disease.

South Gate Police Officer Armando Munoz spoke with V.C. and A. J. at Children's Hospital. A.J. told Munoz that she and appellant had been separated for two weeks. V.C. told Munoz that appellant penetrated her vagina approximately 30 times.

V.C.'s genital warts were surgically removed at Children's Hospital during multiple visits. A.J. took her there more than five times over a period of "many months."

Munoz arrested appellant on May 10, 2006. On July 20, 2006, while appellant was in jail, a staff physician, Policarpio Enriquez, and a nurse, Ricardo

Langcay, each examined appellant's genital area. Enriquez concluded that it was highly probable that a sexually transmitted disease caused the wart he observed on appellant's penis. Langcay did not observe any evidence that appellant had a sexually transmitted disease. Neither Langcay nor Enriquez specialized in treating genital warts or sexually transmitted diseases.

Defense Case

Dr. Earl Fuller, a retired assistant clinical professor of obstetrics and gynecology at University of California, Irvine, reviewed appellant's and V.C.'s medical records. Fuller concluded that the wart on appellant's penis was not related to a sexually transmitted disease. HPV can be transmitted through bodily fluids, contact, and people sharing bath water or towels.

Fuller concluded that V.C.'s accusations were not significantly substantiated because there was no proof that appellant or A.J. had contracted HPV. He opined that if the vagina and anus of an eight-year-old girl had been penetrated on over 300 occasions, that girl would have suffered some kind of injury. He conceded that the absence of tearing or tissue damage did not mean that there was no physical abuse.

DISCUSSION

Appellant contends that "[b]ecause a disease may be transmitted only once from one person to another," there is insufficient evidence to support three of the four great bodily injury enhancements. We disagree.

When the sufficiency of the evidence is challenged, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) On review, we may not substitute our judgment for that of the jury, reweigh the evidence, or reevaluate the credibility of witnesses. (*Ochoa, supra*, at p. 1206.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence [citation] An appellate

court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Reversal is required only when there is no substantial evidence, direct or circumstantial, to support the conviction beyond a reasonable doubt under any hypothesis whatsoever. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Substantial evidence supports the jury's findings that appellant inflicted great bodily injury upon V.C. on multiple occasions. "[G]reat bodily injury means a significant or substantial physical injury." (§ 12022.7, subd. (f).) Appellant concedes that the evidence supports one great bodily injury enhancement, based upon the infliction of HPV as a result of the assaults. (See *People v. Johnson* (1986) 181 Cal.App.3d 1137, 1141.) He argues that because he only transmitted HPV to V.C. once and there was no evidence of when it was transmitted, he cannot be subject to any additional enhancement. Appellant's argument ignores the evidence supporting the multiple enhancement findings.

Appellant sexually assaulted V.C. at least 20 times over a period of many months during 2005 and 2006, when she was seven and eight years old. As a result, V.C. contracted the HPV virus, which is associated with cervical cancer. V.C. had HPV warts on top of her clitoris, inside the labia minor, and underneath her hymen. The warts underneath her hymen were "very violaceous and darkly colored as if they had been traumatized in some way and [there was] a little bleeding into the area containing the warts themselves." The examining doctor concluded that the warts were bruised after their formation. V.C. endured at least five surgical treatments to remove the genital warts.

"It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. "Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled

with a contrary finding.'" [Citations.]" (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) Where appellant had assaulted V.C. at least 20 times over a period of many months, the jury could reasonably infer that after he infected her with HPV, his multiple subsequent assaults caused the bruising and bleeding on her genital warts. It was not required to find that each and every bruise and incidence of bleeding occurred during the same assault, "even though the circumstances might reasonably" support such a finding. (*Ibid.*) Substantial evidence supports all of the great bodily injury enhancements.²

We also reject appellant's contention that the prosecutor committed misconduct by misstating the burden of proof during closing argument. "'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] 'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 176.)

Appellant challenges the following portion of the prosecutor's initial summation to the jury: "What are the undisputed facts in this case? When I say 'undisputed' I mean undisputed. I mean no dispute by defense. Proven beyond a reasonable doubt. [¶] You're in court. One, V. C. . . . is under ten years old No dispute that she is under 14." Appellant's trial counsel objected that the prosecutor's use of the phrase "[n]o dispute" constituted a shifting of the burden of proof to the defense. In overruling the objection, the trial court stated: "I think in this context in

² In *People v. Carter* (2005) 36 Cal.4th 1215, 1269, our Supreme Court upheld the imposition of great bodily injury enhancements for more than one offense (burglary and robbery) committed on a single occasion in a case involving a single injury (death). The trial court stayed the enhancements in *Carter*. (*Id.* at fn. 36.)

which it is being explained to the jury, it can determine her age, and it would be hard really to refute that."

In challenging the prosecutor's comments, appellant claims that the prosecutor argued that "the defendants' failure to offer an adequate explanation warranted a guilty verdict" We disagree. A prosecutor may comment on the state of the evidence and the defendant's failure to introduce material evidence or call logical witnesses. (See *People v. Wash* (1993) 6 Cal.4th 215, 263.) In this case the challenged comments constituted reasonable remarks on the state of the evidence which did not shift the burden of proof. (See *People v. Frye* (1998) 18 Cal.4th 894, 972-973.)

Assuming, arguendo, that the comments were improper, the alleged error was harmless beyond a reasonable doubt. (*People v. Hardy* (1992) 2 Cal.4th 86, 173; *People v. Hovey* (1988) 44 Cal.3d 543, 572.) The evidence of appellant's guilt was overwhelming. The prosecutor opened his argument by explaining that the prosecution had to prove the elements of the crime and the special allegations "beyond a reasonable doubt." Thereafter the prosecutor and appellant's counsel made repeated references to the reasonable doubt standard.

The jury was instructed that the prosecution had the burden of proving appellant guilty beyond a reasonable doubt (CALJIC No. 2.90); that he was presumed innocent (*ibid.*); that it could not draw any inference from the fact that appellant did not testify (CALJIC No. 2.60); and that the statements of counsel were not evidence (CALJIC No. 1.02). It is presumed that the jury understood and followed the instructions. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.) We reject the argument that the alleged misconduct, if any, rendered the trial fundamentally unfair or denied appellant due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Finally, we reject appellant's contention that the court erred by instructing the jury as follows with CALJIC No. 2.20.1: "In evaluating the testimony of a child ten years of age or younger you should consider all of the factors

surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. A child, because of age and level of cognitive development, may perform differently than an adult as a witness, but that does not mean that a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child. [¶] 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge."

Appellant argues that the second sentence of the instruction conveys the "message that a child witness's testimony should be treated differently than an adult's testimony"; instructs the jury "to disregard indications of impaired perception, understanding, memory or communication when evaluating a child witness's credibility"; renders the "credibility determination unreliable and unfair" to the extent that "it requires [jurors] to ignore their own experience interpreting children's non-verbal behavior"; precludes the jury from considering the child's limited cognitive development and poor performance; and unfairly restricts the jury's consideration of evidence affecting the victim's credibility. CALJIC No. 2.20.1 does none of those. It simply tells the jurors that they should evaluate a child's testimony in the context of the child's age. Most jurors would have the common sense to do so, even without an instruction. The instruction does not tell the jurors that they should believe the child witness. Instead, it takes the neutral stance that a child is not "any more or less believable" than an adult.

Appellant acknowledges the cases which have upheld CALJIC No. 2.20.1 against challenges similar to those he raises and argues that those cases were wrongly decided. (*People v. Harlan* (1990) 222 Cal.App.3d 439, 455-456; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1392-1394.) We disagree. Moreover, like the other instructions, CALJIC No. 2.20.1 "may not be judged in artificial isolation, but must be viewed in the context of the overall charge. [Citation." (*Cupp v. Naughten* (1973) 414 U.S. 141, 148.) Here the court also instructed jurors to consider the instructions as a

whole (CALJIC No. 1.1.0), to consider the demeanor, motive and bias of all witnesses and discrepancies (CALJIC Nos. 2.20 & 2.21.1), and whether any witness was "willfully false" (CALJIC No. 2.21.2).

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Thomas I. McKnew, Jr., Judge
Superior Court County of Los Angeles

Mark D. Lenenberg, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E.
Winters, Supervising Deputy Attorney General, Dana M. Ali, Deputy Attorney General,
for Plaintiff and Respondent.